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SUPREME COURT, U.S.

No. 03-5

IN THE

Supreme Court of the United States

DETROIT, DETROIT, L.L.C.,

Petitioner,

v.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MGM GRAND DETROIT, L.L.C.

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QUESTION PRESENTED

Whether this Court should grant a petition for a writ of certiorari where the Petitioner fails to demonstrate that the U.S. Court of Appeals for the Sixth Circuit clearly abused its discretion in denying a motion to intervene into appellate proceedings, which motion was filed in the Sixth Circuit at a time when: (1) the case was over six years old; (2) the case was before the Sixth Circuit for the third time; (3) more than a year had passed since Petitioner clearly knew its interests may be implicated in the case; and (4) nearly seven months had passed since the third appellate proceeding had been initiated.

CORPORATE DISCLOSURE STATEMENT

MGM Grand Detroit, L.L.C. is a Delaware L.L.C. that is 97% owned by MGM Grand Detroit, Inc., a Delaware corporation, which in turn is 100% owned by MGM Grand Resorts, L.L.C., a Nevada L.L.C., which is in turn 100% owned by MGM MIRAGE, a Delaware corporation (a publicly held company).

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Pursuant to Supreme Court Rule 15, Respondent MGM Grand Detroit, L.L.C. ("MGM") opposes Detroit, Detroit, L.L.C.'s ("Detroit, L.L.C.") petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.[1] The Sixth Circuit denied Detroit, L.L.C.'s motion to intervene on appeal as untimely, and Detroit, L.L.C. fails to demonstrate that the Sixth Circuit clearly abused its discretion in denying Detroit, L.L.C.'s motion. As a result, this Court has no jurisdiction over this matter, and Detroit, L.L.C.'s petition must be denied.

STATEMENT OF THE CASE

A. The Underlying Case

The case into which Detroit, L.L.C. seeks to intervene was initiated over six years ago, in February 1997. At that time, plaintiff Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD") filed a complaint in the United States District Court for the Western District of Michigan. LVD's complaint challenged, on state and federal grounds, certain provisions of the Michigan Gaming Control and Revenue Act ("MGCRA"), Mich. Comp. Laws Ann. § 432.201, *et seq*. Because LVD sought relief implicating directly the interests of casino developers Atwater Entertainment Associates, L.L.C. ("Atwater") and Greektown Casino, L.L.C. ("Greektown"), they intervened within weeks of the filing of LVD's complaint.

Under MGCRA, in order to apply for a license from the State of Michigan to construct and operate a casino, a casino

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1. Detroit, L.L.C. fails to list MGM as a respondent. It also fails to include Atwater Entertainment Associates, L.L.C. as a respondent.

developer must have a certified development agreement with the City of Detroit ("the City"). Mich. Comp. Laws Ann. § 432.206(1)(b). The City may certify up to three development agreements. Mich. Comp. Laws Ann. § 432.206(2).

The City passed a Casino Development Competitive Selection Process Ordinance (the "Selection Ordinance") in mid 1997 in order to provide guidelines and criteria for: (1) the Mayor's selection of three developers that would be granted permission to construct and operate casinos in the City; and (2) the City Council's approval of development agreements negotiated by the Mayor and the selected developers. Provisions within the Selection Ordinance made Atwater and Greektown eligible for a preference based on their prior political activities supporting casino gambling in the City. Detroit City Code § 18-13-6.

In summer 1997, various developers interested in the construction and operation of casinos were invited to submit to the City proposals for casino developments. Detroit, L.L.C. participated in that bidding process. However, Detroit, L.L.C. was eliminated after the first of three rounds, well before any final selection was made and well before the application of any preference to any developer.

First in August 1997 and again in October 1997, LVD amended its complaint to include challenges to the Selection Ordinance. However, LVD did nothing to stop the final selection of casino developers under the Selection Ordinance. In November 1997, the Mayor announced his selection of three casino developers: Detroit Entertainment, L.L.C. (a combination of Atwater and Circus Circus Michigan, Inc.), Greektown, and MGM. LVD also did nothing to stop the

negotiation of, or the City Council's consideration and approval of, development agreements between the City and the selected developers. The development agreements were approved by the City Council in April 1998.

LVD's claims were initially dismissed by the district court, and LVD appealed. The Sixth Circuit affirmed in part and reversed in part, holding that LVD had standing to pursue its Equal Protection and First Amendment claims against the Selection Ordinance. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999) ("*Lac Vieux I*").

On remand after the Sixth Circuit's decision, LVD sought to join MGM as a party on May 21, 1999. MGM was not eligible for any preference within the Selection Ordinance, and was selected solely on the merits of its proposal.[2] LVD's motion to join MGM was denied by the district court on October 25, 1999.

The district court subsequently also denied LVD's motion for partial summary judgment, holding that the Selection Ordinance's preference provisions did not violate the First

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2. Contrary to Detroit L.L.C.'s unsupported claims, MGM did not "present[] its development agreement to the city as a package which would be tied to the two preferred entities, thereby essentially assuring MGM that it would receive the one remaining license. . . ." (Petition at 3). MGM was selected by the Mayor of Detroit without regard to the preference. MGM's development agreement was voted on separately by, and was approved by the majority of, the Detroit City Council. There is no evidence in the record in this case that MGM "skewed its development agreement in order to tie it to the preference" (Petition at 3), or that MGM sought specific contractual provisions in order to receive the benefit of any preference provision within the Selection Ordinance.

Amendment. That decision was also appealed. On January 15, 2002, the Sixth Circuit, in a split decision, reversed. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F.3d 876 (6th Cir.), *cert. denied*, 536 U.S. 923, 122 S. Ct. 2589, 153 L. Ed. 2d 779 (2002) ("*Lac Vieux II*"). The case was again remanded.

Upon remand for the second time, the district court entered an order on February 7, 2002 which declared the Selection Ordinance "in its current form" unconstitutional. The district court also directed the parties to inform the court as to outstanding issues that required resolution. LVD filed a response. In addition, on March 13, 2002, LVD filed a separate motion seeking further equitable relief. By this later motion, LVD specifically sought an order requiring that a new selection process be conducted, and orders declaring all three developers' casino licenses and development agreements void.

Because LVD's motion for further relief directly implicated MGM's interests, MGM sought, on April 12, 2002, leave to intervene into the case. MGM's motion was granted by the district court on April 17, 2002. Unlike MGM, Detroit, L.L.C. did nothing at the time to intervene into the case.

The district court denied LVD's motion for further relief on July 9, 2002.[3] LVD filed a notice of appeal on July 16, 2002.

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3. The district court concluded that "MGM was not eligible for, did not seek, and did not receive any preferential treatment in the casino selection process. MGM was as much a victim of the preference provision as was Plaintiff." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, Case No. 2:97-CV-67, 2002 WL 1592596 (W.D. Mich. July 9, 2002), at *11.

B. Detroit, L.L.C.'s Belated Attempt To Intervene In The District Court

Detroit, L.L.C. filed in the district court a motion to intervene on July 22, 2002, six days after LVD filed its notice of appeal. Because the district court no longer had jurisdiction of the case, Detroit, L.L.C. subsequently filed a notice requesting that its motion to intervene be withdrawn. The motion was withdrawn on August 6, 2002, when the district court granted Detroit L.L.C.'s request.

C. Detroit, L.L.C.'s Motion To Intervene Into Appellate Proceedings

Detroit, L.L.C. waited until February 6, 2003 – nearly seven months after LVD filed its notice of appeal – to file in the Sixth Circuit a motion to intervene as a plaintiff-appellant. By February 2003, the existing parties had been engaged in court-ordered mediation for nearly five months. Detroit, L.L.C.'s motion stated that its reason for seeking intervention was because it "was concerned that if it does not intervene at this time, that resolutions could be had whether by judicial ruling or settlement that bar relief that would be specifically appropriate for it and other participants who made substantial monetary and time commitments to a casino bidding procedure which [the Sixth Circuit] has now found to be unconstitutional." (Detroit L.L.C.'s Motion to Intervene at ¶ 9). LVD, Detroit Entertainment, L.L.C., MGM, Atwater, and Greektown filed briefs opposing Detroit, L.L.C.'s motion.

The Sixth Circuit on March 28, 2003 denied Detroit, L.L.C.'s intervention motion, concluding that the motion was not timely.

ARGUMENT

The case into which Detroit, L.L.C. sought to intervene is over six years old. Well before this case was brought to the Sixth Circuit for the third time, Detroit, L.L.C. was aware that its interests may be implicated in the case. Rather than move to intervene in the district court when LVD made clear that it was seeking an order for a new bidding process, Detroit, L.L.C. waited for over a year and then filed its motion in the Sixth Circuit. Detroit, L.L.C. fails to demonstrate that the Sixth Circuit clearly abused its discretion in denying Detroit, L.L.C.'s motion to intervene as a plaintiff into ongoing appellate proceedings and, as a result, its petition must be denied.

A. An Appellate Court's Decision As To A Motion To Intervene In Appellate Proceedings Is Discretionary And Is Reviewed For Clear Abuse Of Discretion

Detroit, L.L.C. claims entitlement to intervention as of right under Fed. R. Civ. P. 24(a). (Petition at i, 7). "The Federal Rules of Civil Procedure, of course, apply only in the federal district courts." *International Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10, 86 S. Ct. 373, 15 L. Ed. 2d 272 (1965); *see also* Fed. R. Civ. P. 1. Procedure in the United States Courts of Appeals is governed by the Federal Rules of Appellate Procedure. Fed. R. App. P. 1(a). There is no rule of appellate procedure governing intervention motions filed with a Court of Appeals in a case such as this one.[4] Thus, unlike the Federal Rules of Civil Procedure, no "intervention of right" is provided in the Federal Rules of Appellate Procedure.

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4. In cases involving review or enforcement of agency orders, intervention motions must be filed "within 30 days after the petition for review is filed." Fed. R. App. P. 15(d).

As a result, intervention into appellate proceedings is permissive only. Under applicable case law, "[a] court of appeals *may* allow intervention at the appellate stage where none was sought in the district court only in an exceptional case for imperative reasons." *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985) (per curiam) (emphasis added; internal quotation marks and citations omitted), *cert. denied sub nom. Metropolitan Atlanta Rapid Transit Authority v. Amalgamated Transit Union Int'l*, 475 U.S. 1046, 106 S. Ct. 1262, 89 L. Ed. 2d 572 (1986).[5] Thus, courts of appeals have discretion in allowing persons not parties to join an ongoing appeal. *See Hall*, 117 F.2d at 1230.

After consideration of various factors relevant to the intervention decision, the Sixth Circuit denied Detroit, L.L.C.'s motion as untimely. (*See* Order, Appendix A to Petition, at 3a). Because intervention into ongoing appellate proceedings is left entirely to the discretion of courts of appeals, the Sixth Circuit's decision can *only* be reviewed for clear abuse of discretion. *See Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 142, 64 S. Ct. 905, 88 L. Ed. 1188 (1944) ("The exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown . . .").

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5. *See also In re Grand Jury Investigation Into Possible Violations Of Title 18*, 587 F.2d 598, 601 (3d Cir. 1978); *McKenna v. Pan Am. Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997); *Hutchinson v. Pfeil*, 211 F.3d 515, 518 (10th Cir.), *cert. denied*, 531 U.S. 959, 121 S. Ct. 384, 148 L. Ed. 2d 296 (2000); *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997).

Detroit, L.L.C. asserts that review of the Sixth Circuit's denial of its motion to intervene should be *de novo*.[6] (Petition at 6). To support this contention, Detroit, L.L.C. relies on *Bose Corp. v. Consumers Union of United States, Inc.* 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984).

Bose is inapposite. *Bose* stands for the proposition that a reviewing court faced with a lower court determination on the merits of a First Amendment claim must conduct an independent review of a lower court's findings with respect to whether the speech at issue is protected by the First Amendment. *See Bose*, 466 U.S. at 511. The Sixth Circuit in *Lac Vieux II* decided the First Amendment issues that were raised in this case, and this Court denied certiorari. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F.3d 876 (6th Cir.), *cert. denied*, 536 U.S. 923 (2002).

At issue now before the Sixth Circuit is whether the district court properly denied LVD's request for equitable relief beyond the entry of a declaratory judgment. The standard described in *Bose* is inapplicable to that issue. Detroit, L.L.C.'s contention that a *de novo* standard of review applies has no basis and should be rejected.

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6. Had Detroit, L.L.C. obtained a denial on the basis of untimeliness from a district court, appellate review would have been for abuse of discretion. *NAACP v. New York*, 413 U.S. 345, 366, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973); *United States v. Tennessee*, 260 F.2d 587, 592 (6th Cir. 2001).

B. The Sixth Circuit's Denial Of Detroit, L.L.C.'s Motion Was Not A Clear Abuse of Discretion

Detroit, L.L.C. also contends that the Sixth Circuit abused its discretion in determining that its motion for intervention was untimely, ostensibly because the court's written opinion was short and to the point.

The Sixth Circuit did not abuse its discretion in denying Detroit, L.L.C.'s motion to intervene. Detroit, L.L.C. simply did not demonstrate that this was "an exceptional case" requiring intervention "for imperative reasons." *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d at 1552.

Detroit, L.L.C. asserts that it has standing to pursue relief against the City. (Petition at 9). Because Detroit, L.L.C. participated in the bidding process and was eliminated well before any preference was applied, Detroit, L.L.C. has no standing to pursue claims for relief against the City. *Barden Detroit Casino, L.L.C. v. City of Detroit*, 230 F.3d 848, 854 (6th Cir. 2000) ("Here the preference established by the Detroit ordinance caused no actual injury to Barden, the preference not having been invoked until after Barden had already been eliminated from the bidding."). Moreover, as was the case for the plaintiff in *Barden*, Detroit, L.L.C. signed a release waiving all claims it had against the City. (*See* Exhibit A to Detroit, L.L.C.'s Motion to Intervene). At least two courts have held this very waiver operates to eliminate the releasor's legal and equitable claims against the City. *Barden Detroit Casino, L.L.C. v. City of Detroit*, 59 F. Supp. 2d 641, 669-670 (E.D. Mich. 1999) ("[T]he Court finds as a matter of law that the Consent and Release bars all of BDC's claims, including the constitutional claims, against the Detroit Defendants."), *aff'd*, 230 F.3d 848 (2000); *NewCentury Detroit L.L.C. v. City of*

Detroit, Case No. 97-75154 (E.D. Mich. June 3, 1998). In order to demonstrate an entitlement to any relief against the City, Detroit, L.L.C. must show that its Release is ineffectual – a claim that it has not made.

Even if Detroit, L.L.C. can claim a legal interest in the outcome of this case, Detroit, L.L.C. waited for a year after it knew its interests may be implicated in this case before it pursued intervention. During that year, LVD raised the issue whether it was entitled to a new selection process, the district court decided the issue, LVD filed a notice of appeal, and the existing parties participated in appellate proceedings. At the time of Detroit, L.L.C.'s motion, the parties had been engaged in court-ordered mediation for five months, and had not yet concluded that process. All briefing in the Sixth Circuit is now complete.

Because there is no rule governing intervention into appellate proceedings in a case such as this one, the Sixth Circuit turned to Fed. R. Civ. P. 24 for guidance.[7] (*See* Order, Appendix A to Petition, at 2a). Contrary to Detroit, L.L.C.'s contention, the Sixth Circuit did not use "the length of time that has passed [as] the sole basis of its decision. . . ." (Petition at 9).

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7. Detroit, L.L.C. relies heavily on Fed. R. Civ. P. 24 and on case law applying that Rule in presenting its arguments before this Court, (*see* Petition at 6, 7, 8, 10, 11), and suggests that the Sixth Circuit committed reversible error in not following the dictates of Rule 24. Procedural decisions in appellate courts are not governed by Fed. R. Civ. P 24, or by its related case law. Courts of Appeals considering intervention motions can, ***but need not***, look to Fed. R. Civ. P. 24 for ***guidance***. ***International Union, UAW v. Scofield***, 382 U.S. at 217 n.10 ("[T]he policies underlying intervention ***may*** be applicable in appellate courts." (emphasis added)). By definition, the use of Rule 24 as guidance cannot be the basis of a claim that an appellate court clearly abused its discretion.

The Sixth Circuit noted that five factors are generally relevant to an assessment of timeliness under Fed. R. Civ. P. 24. (Order, Appendix A to Petition, at 2a-3a). Detroit, L.L.C. contends that "the lower Court did not make any analysis of those factors." (Petition at 8 n.3). Even if procedure in the Sixth Circuit were governed by Fed. R. Civ. P. 24 (which it is not), Detroit, L.L.C.'s contention is meritless. The Sixth Circuit noted "the point to which the suit has progressed" (the first factor), when it considered that the "litigation has been pending for more than six years, with two prior appeals to [the Sixth Circuit.] The district court has now entered a final judgment, which is the subject of this third appeal." (Order, Appendix A to Petition, at 3a).

The Sixth Circuit also noted "the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case" (the third factor). (*Id.* at 2a). Here, the appellate court noted that Detroit, L.L.C. was aware of its interests in the litigation by at least January 2002 – more than a year prior to its filing its motion to intervene into appellate proceedings. (*Id.* at 3a). Detroit, L.L.C. admitted that it could have filed its motion months before it did. (Detroit, L.L.C.'s Motion to Intervene at 9 ["One may argue that Detroit, L.L.C. could have brought its motion before the Court of Appeals in August of 2002 and they would be correct."]).

Because Detroit, L.L.C. has not demonstrated that the Sixth Circuit clearly abused its discretion in denying Detroit, L.L.C.'s intervention motion, this Court has no jurisdiction to review that decision. *See Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 525, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947) ("[I]f the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it."). Thus, Detroit, L.L.C.'s petition must be denied.

CONCLUSION

For the foregoing reasons, Respondent MGM Grand Detroit respectfully requests that this Court deny Detroit, L.L.C.'s petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

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